92-1738

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1992

RALPH J. ABRAMO, JR.,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

BRENDAN J. PERRY,
Counsel of Record
CHRISTOPHER M. PERRY,
TERANCE P. PERRY,
BRENDAN J. PERRY & ASSOCIATES, P.C.,
95 Elm Street,
P.O. Box 6938,
Holliston, Massachusetts 01746.
(508) 429-2000

April 30, 1993

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED FOR REVIEW

I. ARE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION VIOLATED WHEN IDENTICALLY SITUATED CRIMINAL DEFENDANTS ARE SUBJECTED TO DISPARATE CEILINGS OF INCARCERATION PREDICATED UPON THEIR "APPEARANCE" OR THE DEPARTMENT OF THE STATE TRIAL COURT WHICH HAS OBTAINED JURISDICTION?

II. ARE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE COURT CRIMINAL DEFENDANT IS ORDERED TO EXECUTE A FIVE YEAR SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION, PURSUANT TO ONE STATE STATUTE, WHEN TWO OTHER STATE STATUTES PROHIBIT ANY COURT OF SUCH

QUESTIONS PRESENTED FOR REVIEW

STATE FROM ORDERING A DEFENDANT TO EXECUTE A SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION WHICH EXCEEDS TWO AND ONE HALF YEARS IN DURATION?

III. DOES THE VOLUNTARY DISMISSAL OF AN INITIAL CRIMINAL PROSECUTION PRECLUDE A STATE FROM VIABLY CONTENDING THAT ANY PUTATIVE ACT OF WAIVER WITHIN SUCH PROCEEDING REGULATES THE CONSTITUTIONAL RIGHTS WHICH A DEFENDANT MAY ASSERT IN A SECOND CRIMINAL PROSECUTION SUBSEQUENTLY COMMENCED AGAINST HIM?

IV. IF STATUTES RESULT IN AN OVERTLY DISCRIMINATORY CLASSIFICATION IS ONE WHO HAS BEEN INJURED THEREBY REQUIRED TO DEMONSTRATE THAT THE DISCRIMINATION IS PURPOSEFUL OR INTENTIONAL?

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UNOFFICIAL/OFFICIAL REPORTS OR OPINIONS

The trial court, the Worcester Division of the Superior Court Department of the Trial Court (hereinafter "Worcester Superior Court"), did not issue any official or unofficial opinions. On April 8, 1991 the Worcester Superior Court denied the Petitioner's Motion to Dismiss (Pet. App. at p. 11). On November 5, 1991 said Court denied the Petitioner's Massachusetts Rule of Criminal Procedure 30 Motion for Post Conviction Relief together with his Motion for a Required Finding of Not Guilty and his Verified Petition for A Writ of Habeas Corpus Ad Subjiciendum. (Pet. App. at p. 14, 17, 20). The Appeals Court for the Commonwealth of Massachusetts (hereinafter "Appeals Court") issued no official opinion but an unofficial opinion and order were issued by it on December 22, 1992. (Pet. App. at p.

1, 2, 3). The decision by the Appeals Court, affirming the judgments of the trial court, appears in 33 Mass. App. Ct. 1119 (1992) (Pet. App. at p. 4).

The Supreme Judicial Court of the Commonwealth of Massachusetts (hereinafter "Supreme Judicial Court") did not issue an official opinion when it denied discretionary appellate review on February 8, 1993. (Pet. App. at p. 42). The order of the Supreme Judicial Court, denying discretionary appellate review, appears in 414 Mass. 1102 (1993) (Pet. App. at p. 43).

JURISDICTIONAL STATEMENT

The judgment which the Petitioner seeks to review was entered on December 22, 1992 by the Appeals Court. Discretionary appellate review was denied by the Supreme Judicial Court on February 8, 1993. The statutory provision confer-

ring jurisdiction on this Court to review the judgment of the Appeals Court is 28 U.S.C. § 1257(a). The referenced statute provides, in pertinent part, that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the supreme court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . .

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV, § 1

Federal Statutory Provisions

28 U.S.C. § 1257(a)

Massachusetts Rules of Criminal Procedure

Mass. R. Crim. P. 3

Mass. R. Crim. P. 30

Massachusetts General Laws

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STATEMENT OF THE CASE

The Petitioner, Ralph J. Abramo, Jr., is a male person who, prior to August 29, 1991, had never been convicted of any misdemeanor or felony. On July 6, 1990, the Petitioner was charged with six (6) crimes, three (3) violations of G.L. c. 265, § 13B and three (3) violations of G.L. c. 265, § 23. The initial charges arose by way of a Complaint which was issued by the Uxbridge Division of the District Court Department of the Trial Court. Thereafter, on August 14, 1990, the Petitioner was bound over to the

Worcester Superior Court where he was indicted on November 5, 1990 by a Worcester County Grand Jury. Said Grand Jury returned six (6) True Bills of Indictment, numbered 90-2765, 90-2766, 90-2767, 90-2768, 90-2769 and 90-2770 (hereinafter the "initial indictments"), against the Petitioner.

On March 4, 1991 a Worcester County Grand Jury returned six (6) additional True Bills of Indictment against the Petitioner which were numbered 91-0478, 91-0479, 91-0480, 91-0481, 91-0482 and 91-0483 (hereinafter the "subsequent indictments"). The subsequent indictments charged the Petitioner with the same offenses as contained in the initial indictments, i.e. Rape and Abuse of a Child Under the Age of Sixteen (G.L. c. 265, § 23) and Indecent Assault and Battery on a Child Under the Age of Fourteen (G.L. c. 265, §13B). The Commonwealth

alleged, through the subsequent indictments, that the Petitioner, between November 1, 1989 and July 4, 1990, committed, on "divers dates", several counts of Rape and Abuse of a Child Under the Age of Sixteen (G.L. c. 265, § 23) and Indecent Assault and Battery on a Child Under the Age of Fourteen (G.L. c. 265, § 13B) upon each of the three (3) alleged victims.

On March 21, 1991 the Commonwealth of Massachusetts unilaterally dismissed the initial indictments. No Division of the Massachusetts District Court issued any Complaint relating to the subsequent indictments and the Petitioner has not otherwise appeared, been arraigned or attended a probable cause hearing in any division of the District Court in relation to the felonies contained within the subsequent indictments. On August 29, 1991 the jury returned verdicts of not

guilty on indictments numbered 91-0479, 91-0480, 91-0481 and 91-0483 and the Defendant's Motion for a Required Finding of Not Guilty was allowed in relation to indictment number 91-0478. The jury found the Petitioner guilty on indictment number 91-0482 which indictment charged the Petitioner with Indecent Sexual Assault and Battery upon a Child under the Age of Fourteen (G.L. c. 265, § 13B). (Pet. App. at p. 25, 39). On said date the Petitioner was sentenced to execute and commenced executing a five (5) year term of incarceration at the Massachusetts Correctional Institute, Concord, Massachusetts (hereinafter "MCI Concord"). (Pet. App. at p. 21). MCI Concord is a House of Correction.

The Petitioner appealed both the verdict of the twelve (12) man jury sitting in Worcester Superior Court together with the judgment entered thereon and the

denial by the trial court of the following motions and petition:

A. Motion for a Required Finding of Not Guilty;

B. Mass. R. Crim. P. 30 Motion for Post Conviction Relief;

C. Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum.

The Petitioner timely filed a Motion, Affidavit and Memorandum in Support of a Motion to Dismiss the subsequent indictments, Motions for a Required Finding of Not Guilty (at the close of the Commonwealth's case, at the close of the Petitioner's case and within five (5) days of the jury having been discharged), a Mass. R. Crim. P. 30 Motion for Post Conviction Relief together with an Affidavit and Memorandum in Support of same and a Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum accompanied by an Affidavit and a Memorandum. The Petitioner renewed his Motion to Dismiss

the subsequent indictments on August 28, 1991 which date was the first day of trial.

On February 4, 1993, the Petitioner was released from a minimum security facility (House of Correction). The Petitioner is currently and will be subject to numerous parole conditions up to and including August 28, 1996. (Pet. App. at p. 44). In short, the Petitioner is still in the custody of the Commonwealth of Massachusetts and will be up to and including August 28, 1996. "While the Petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of [Massachusetts] Parole Board within the meaning of the habeas corpus statute.." Jones v. Cunningham, 371 U.S. 236, 243 (1963).

This case has been before this Court on a previous occasion. On June 13, 1991 the Petitioner filed a Renewed Application to Stay State Court Criminal Proceedings with the late Mr. Justice Marshall who referred same to the Court. The Court denied such application on June 24, 1991. Abramo v. Worcester Division of the Superior Court, Etc., ___ U.S. ___, 115 L.Ed. 2d 1015, 111 S.Ct. 2846 (1991). The initial application was addressed to and denied by the Circuit Justice, Mr. Justice Souter.

STAGE OF PRIOR PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED AND MANNER IN WHICH THEY WERE DETERMINED BY TRIAL AND APPELLATE COURTS

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleadings timely filed in the Worcester Superior

Court at the indicated stage:

Pleading	Stage
Motion for a required finding of not guilty	Within five (5) days of the Jury having been discharged: 9/6/91 Denied: 11/5/91
Motion to Dismiss	Prior to Trial: 4/2/91 Denied: 4/8/91
Renewed Motion to Dismiss	Prior to Trial: 8/28/91 Denied: 8/28/91
Mass. R. Civ. P. 30 Motion for Post Conviction Relief	Post Trial: 10/22/91 Denied: 11/5/91
Verified Petition for A Writ of Habeas Corpus Ad Subjiciendum	Post Trial: 10/18/91 Denied: 11/5/91

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleadings timely filed in the Appeals Court at the indicated stages:

Pleading	Stage
Notice of Appeal	Filed: 9/26/91
Notice of Appeal	Filed: 12/2/91
Appellate Brief	Appeal: 3/11/92

On December 22, 1992 the Appeals Court affirmed the judgment of the Worcester Superior Court and the denials by the said court of the Petitioner's Motion For a Required Finding of Not Guilty, his Mass. R. Crim. P. 30 Motion For Post Conviction Relief and his Verified Petition For A Writ Of Habeas Corpus Ad Subjiciendum.

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleading timely filed in the Supreme Judicial Court at the indicated stage:

Pleading	Stage
Application For Leave To Obtain Further (Discretionary) Appellate Review	Filed: 12/29/92 Denied: 2/8/92

ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

I. THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

ARE VIOLATED WHEN IDENTICALLY SITUATED CRIMINAL DEFENDANTS ARE SUBJECTED TO DISPARATE CEILINGS OF INCARCERATION PREDICATED UPON THEIR "APPEARANCE" OR THE DEPARTMENT OF THE STATE TRIAL COURT WHICH HAS OBTAINED JURISDICTION

The trial courts of the Commonwealth of Massachusetts are comprised of the Land Court, Probate Court, District Court and Superior Court. The District and Superior Courts are situated throughout the Commonwealth of Massachusetts in the various counties. The Appeals Court is an intermediate court of appeal. The final appellate court within the Commonwealth is the Supreme Judicial Court. With but few exceptions not applicable to the instant case, further appellate review by the Supreme Judicial Court of a decision by the Appeals Court is discretionary in nature. The Worcester Superi-

or Court sentenced the Petitioner to execute a five (5) year term of incarceration at MCI Concord subsequent to his trial and conviction for having allegedly violated G.L. c. 265, § 13B. (Pet. App. at p. 21, 39).

The basis of the Petitioner's constitutional argument is that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution are violated when Superior Court defendants are subjected to a ceiling of incarceration of 10 years for a first time violation of G.L. c. 265, § 13B while identically situated District Court defendants are subjected to a ceiling of incarceration of only 2.5 years. G.L. c. 218, § 26, G.L. c. 265, § 13 B, G.L. c. 279, § 23, G.L. c. 218, § 27, G.L. c. 274, § 1. It is apparent that such a disparity (7.5 years) violates the mandates imposed by the Equal Protection

and Due Process Clauses of the Fourteenth Amendment.

G.L. c. 218, § 26 provides that the District Court "shall have original jurisdiction, concurrent with the Superior Court, [over the offense of] ... indecent assault and battery on a child under fourteen years of age." G.L. c. 279, § 23 precludes District Courts from ordering a male prisoner to execute a sentence of incarceration in a jail or house of correction for a period longer than 2.5 years. Since G.L. c. 265, § 13B allows only for incarceration in a State Prison, House of Correction or Jail and since a District Court cannot sentence to a state prison, the maximum sentence which the District court can impose, without suspending same, for a violation of G.L. c. 265, § 13B is 2.5 years regardless of first offender or habitual offender status. See G.L. c. 218, § 27; G.L. c.279,

§ 23; G.L. c. 265, § 13B; G.L. c. 218, § 26. Alternatively, the Superior Court may sentence a first time offender, with no previous criminal record, to a ten (10) year term of incarceration upon being convicted for having violated G.L. c. 265, § 13B. See G.L. c. 265, § 13B; G.L. c. 274, § 1; G.L. c.218, § 27, G.L. c. 279, § 23. Therefore, depending solely upon the fortuitous circumstance of the particular trial court (District Court or Superior Court) in which a defendant is tried, there exists a 7.5 year statutory disparity between the ceilings of incarceration.

The issue here is quite simple. Is it constitutional to treat identically situated individuals (first time offenders having no previous criminal records) who have been charged with the identical criminal offense (G.L. c. 265, § 13B) in a dissimilar fashion by subjecting them

to disparate ceilings of incarceration? The Petitioner respectfully submits that the answer must be in the negative. It has long been held that "in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offenses". Barbier v. Connolly, 113 U.S. 27, 31 (1885). The "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants..." Williams v. Illinois, 399 U.S. 235, 244 (1970).

Section One of the Fourteenth Amendment of the United States Constitution reads as follows:

AMENDMENT XIV [1868]

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and

> of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The threshold inquiry, in any case in which an Equal Protection Clause violation is asserted, is to determine the level of scrutiny to be applied to the allegedly illegal classification. "In determining whether a class based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." Plyler v. Doe, 457 U.S. 202, 217 & n.15 (1982). Liberty is defined within the confines of the Due Process Clause as the right "..generally to enjoy those

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment." Ingraham v. Wright, 430 U.S. 651, 673-674 (1977)(footnote omitted.)

Since the Petitioner has been subjected to incarceration and will be subjected to numerous parole conditions, as a consequence of his having been convicted for allegedly violating G.L. c. 265, § 13B, an interest explicitly protected under the Due Process Clause has been and continues to be implicated. The Defendant, having been convicted under G.L. c. 265, § 13B, has been classified as a

felon and deprived of the freedom ". . to be with family and friends and to form the other enduring attachments of normal life". Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Meachum v. Fano, 427 U.S. 215 (1976). Since the Petitioner has been and is currently subjected to the deprivation of his liberty interests, explicitly and implicitly protected by the Due Process Clause, strict scrutiny analysis must be applied to any classification which unequally disadvantages the Petitioner in relation to these fundamental rights. Plyler v. Doe, 457 U.S., at 217 & n. 15.

The Petitioner acknowledges that a State has a liberal right to enact statutes to combat particular problems of a varying nature. "The range of discretion that a state possesses in classifying objects of legislation ... may be excused from [expression], in view of [this

Court's] very recent decisions. The power may be determined by degrees of evil, or exercised in cases where detriment is specially experienced." Armour & Co. v. North Dakota, 240 U.S. 510, 517 (1916). The severity of the potential ceiling of incarceration for violating G.L. c. 265, § 13B is not here challenged by the Petitioner since it is conceded that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Likewise, the Petitioner is cognizant of the fact that "the Fourteenth Amendment does not require that state laws shall be perfect; and we cannot judicially denounce [statutes] as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a state legislature about resorting to classification when establish-

ing regulations for the welfare of those for whom they legislate". Missouri, Kansas & Texas Ry. v. Cape, 233 U.S. 642 650 (1914). See also Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 238, 293 (1897). Accordingly, the Petitioner does not contest the maximum levels of incarceration superficially delineated in G.L. c. 265, § 13B. The Petitioner does, however, contest the classification which allows some Defendants (those tried and convicted in a District Court) to arbitrarily and fortuitously escape the enhanced ceiling of incarceration to which only Superior Court Defendants are subjected. See G.L. c. 265, § 13 B, G.L. c. 218, § 27, G.L. c. 279, § 23, G.L. c. 218, § 26, G.L. c. 274, § 1.

It must here be noted that the Petitioner's attack on this statutory scheme is not an attempt to wrest from a sentencing judge the plenary power which he

or she retains in determining the type and kind of punishment to be inflicted upon a particular Defendant. See Williams v. Illinois, 399 U.S. 235, 243 (1970). It is the prerogative of a sentencing judge to sentence particular defendants to disproportionate terms of incarceration predicated upon the factual circumstances extant in each case. However, the present statutory framework essentially and illegally "precludes a [District Court] judge from imposing on ... any defendant the maximum penalty provided by law." Williams v. Illinois, 399 U.S., at 243. No matter how "bad" an "actor" the District Court defendant is, a District Court Judge may not legally sentence him to execute a term of incarceration exceeding 2.5 years even though the substantive criminal statute (G.L. c. 265, § 13B) allows for convicted first time offenders to be incarcerated for 10

years. See G.L. c. 265, § 13B; G.L. c. 218, § 26; G.L. c. 218, § 27; G.L. c. 279, § 23. Since the disproportionate ceilings of potential incarceration are imposed prior to trial, without a determination of guilt, without an inspection of the gruesomeness of the Defendant's alleged conduct, without an inspection of the Defendant's background and without an inspection of the various other factors utilized to determine the term of incarceration to be imposed, the Commonwealth cannot viably assert that the Defendant is attempting to strip the sentencing power from the judicial branch.

The unequal deprivation of liberty interests present here dictates that the Commonwealth must demonstrate that such a deprivation is "necessary to protect a compelling and substantial governmental interest". Dunn v. Blumstein, 405 U.S. 330, 341 (1972) (quoting Oregon v. Mit-

chell, 400 U.S. 112, 238 (1970)). It must be remembered that: "[s]tatutes affecting constitutional rights must be drawn with 'precision', and must be 'tailored' to serve their legitimate objectives". Dunn v. Blumstein, 405 U.S., at 343 (citations omitted.) It is apparent that the dispositive inquiry in this case becomes whether or not the Commonwealth of Massachusetts is capable of demonstrating the existence of a compelling governmental interest which makes necessary the discrimination to which Superior Court defendants are currently subjected.

M.G.L. c. 218, § 30 dictates that a District Court may:

> [c]ommit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. (emphasis added).

The Commonwealth cannot logically assert that it has a compelling govern-

mental interest in imposing a 2.5 year ceiling of incarceration on one class of criminal Defendants while imposing a 10 year ceiling on other identically situated Defendants predicated upon a first blush "appearance" of innocence or lack of same. This classification is in contravention of Fourteenth Amendment jurisprudence and the dictate of Barbier v. Connolly since it would impose a different or higher punishment ". . upon one than such is prescribed to all for like offenses". Id. 113 U.S., at 31.

Prior to conviction, a Defendant is presumed to be innocent of all felonies or misdemeanors with which he has been charged. Therefore, when an individual is subjected to the threat of increased terms of incarceration by virtue of his "appearance" of guilt he is deprived of the referenced constitutional right. "The principle that there is a presump-

tion of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895); see also Taylor v. Kentucky, 436 U.S. 478, 483 (1978).

The unequal deprivation of an individual's liberty interests predicated solely upon his "appearance" is the very capriciousness which the Equal Protection Clause proscribes. G.L. c. 218, § 26, G.L. c. 218, § 27, G.L. c. 218, § 30, G.L. c. 279, § 23 and Rule 3(e) of Mass. R. Crim. P. may be utilized in conjunction with G.L. c. 265, § 13B, which itself thereby becomes unconstitutional, to arbitrarily expose a Defendant to incarceration for much lengthier periods if tried, convicted and sentenced in the Superior Court than would be possible were the proceeding to occur in the Dis-

trict Court. A multitude of circumstances can be envisioned where oppression, collusion, fraud and politics may determine the potential ceiling of a Defendant's incarceration. [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation.." Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

Likewise, the unilateral and absolute power of the Commonwealth of Massachusetts, whether exercised by whim, political intervention or otherwise, to dole out different levels of punishment predicated upon the Trial Court in which the Defendant is tried (District v. Superior) is not necessitated by a "compelling governmental interest" which could justify this discriminatory treatment. See Dunn v. Blumstein, 405 U.S. 330, 342, 343 (1972). "It is not, under any view,

the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail." Cincinnati Street Railway Company v. Snell, 193 U.S. 30, 37 (1904).

When it is demonstrated that there exists, as there does here, an invidious classification violative of the Equal Protection Clause then there is, necessarily, a concurrent violation of the Due Process Clause. See Loving v. Virginia, 388 U.S. 1, 12 (1967). "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of

due process." Bolling v. Sharp, 347 U.S. 497, 499 (1954).

Since the classification at issue here trammels upon fundamental rights this Court presumes the unconstitutionality of the statutory discrimination. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The onus is now clearly upon the Commonwealth of Massachusetts to demonstrate that the referenced statutory framework is constitutional.

II. THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION ARE VIOLATED WHEN A STATE COURT CRIMINAL DEFENDANT IS ORDERED TO EXECUTE A FIVE YEAR SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION, PURSUANT TO ONE STATE STATUTE, WHEN TWO OTHER STATE STATUTES PROHIBIT ANY COURT OF SUCH STATE FROM ORDERING A DEFENDANT TO EXECUTE A

SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION EXCEEDING TWO AND ONE HALF YEARS IN DURATION

On August 29, 1991 the Petitioner was sentenced to execute a five (5) year term of incarceration at MCI Concord which facility is correctly characterized as a House of Correction. See G.L. c. 126, § 8; G.L. c. 279, § 33. When an individual is convicted for having violated G.L. c. 265, § 13B, said statute and G.L. c. 279, § 23 dictate that he may not be compelled to execute a sentence of incarceration in a jail or house of correction which exceeds two and one half years. Alternatively, G.L. c. 279, § 33 states that a person may be compelled to execute a sentence of incarceration for a period greater than 2.5 years at MCI Concord if the term of the imposed incarceration is for a period greater than 2.5 years and the incarceration results from

the alleged commission of a felony. See G.L. c. 279, § 33. Since a violation of G.L. c. 265, § 13B is a felony [see G.L. c. 265, § 13 B, c. 274, § 1] and since the term of incarceration here at issue was to have been greater than 2.5 years, G.L. c. 279, § 33 "allowed" the sentencing judge to compel the Petitioner to execute a sentence of incarceration greater than 2.5 years in a house of correction. This power and its utilization clearly derogate from the mandates imposed by the Fourteenth Amendment and G.L. c. 265, § 13B and G.L. c. 279, § 23.

G.L. c. 279, § 33 violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution since said statute prescribes a higher punishment for some individuals, identically circumstanced with others, than is provided for in G.L. c. 265, § 13B and G.L. c. 279, § 23. See

Williams v. Illinois, 399 U.S. 235 (1970); Barbier v. Connolly, 113 U.S., at 31 (1885). Necessarily, G.L. c. 279, § 23 and G.L. c. 265, § 13B must define the permissible punishment since "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971); see also United States v. Bass, 404 U.S. 336, 347 (1971). After all, "the touchstone of due process is the protection against the arbitrary action of the government" necessarily dictating that the least onerous statutes are the only statutes which may be utilized to determine the length and ceiling of a Defendant's incarceration. Wolf v. McDonnell, 418 U.S. 539, 558 (1974). "[A] person's liberty [interest] is equally protected, even when the liberty itself is a statutory creation of the State". Wolf, 418 U.S., at 558.

It is clear that the above delineated classification fails to withstand strict scrutiny analysis. There can be no compelling governmental interest in subjecting defendants to such disparate treatment when viewed in light of the goals of the criminal laws and constitutional dictates. See Plyler, 457 U.S., at 202 (1982); Bass, 404 U.S., at 347, Barbier, 113 U.S., at 31.

It cannot be logically contended that G.L. c. 279, § 33 is necessary to preserve a judge's post conviction sentencing powers. Under the current statutory scheme a District Court judge cannot sentence a Defendant to execute a term of incarceration exceeding 2.5 years. G.L. c. 279, § 23; G.L. c. 218, § 27; G.L. c. 265, § 13B. Therefore, since a District Court judge is statutorily precluded from sentencing any Defendant to execute a term of incarceration at MCI Concord or

any other House of Correction or Jail exceeding 2.5 years, said judge need not avail himself of G.L. c. 279, § 33 to fully "exercise" his post conviction sentencing power. Similarly, Superior Court judges need not utilize G.L. c. 279, § 33 to incarcerate a Defendant beyond 2.5 years for violating G.L. c. 265, § 13B since they may order convicted first time offenders to execute sentences of up to 10 years in alternative penal institutions. See G.L. c. 279, § 23, G.L. c. 218, § 27, G.L. c. 265, § 13B, G.L. c. 274, § 1. Therefore, neither District Court judges nor Superior Court judges need rely upon G.L. c. 279, § 33 in order to utilize fully their post conviction sentencing power.

III. THE VOLUNTARY DISMISSAL OF AN INITIAL CRIMINAL PROSECUTION PRECLUDES A STATE FROM CONTENDING THAT ANY ASSERTED ACT OF WAIVER WITHIN SUCH

PROCEEDING REGULATES THE CONSTITUTIONAL RIGHTS WHICH A DEFENDANT MAY ASSERT IN A SECOND CRIMINAL PROSECUTION SUBSEQUENTLY COMMENCED AGAINST HIM

No Division of the Massachusetts District Court issued any Complaint relating to the subsequent indictments and the Petitioner has not otherwise appeared, been arraigned, been bound over from or attended a probable cause hearing in any division of the District Court in relation to the felonies contained within the subsequent indictments. The procedural history of this case has never been contested by the Commonwealth. On page twenty-one (21) of its brief filed in the Appeals Court the Commonwealth stated, in footnote eleven (11), that:

> The Commonwealth notes that the indictments arising out of the initial district court complaints were dismissed at bar. Defendant, therefore, appeals

from a conviction in a prosecution begun by direct indictment in the Superior Court.

Despite its admission that the second criminal prosecution was never subjected to the jurisdiction of the District Court, the Commonwealth has persisted in contending that the Petitioner "raised no challenge to the bind-over process [G.L. c. 218, § 30] in the District Court." Consistent with this position, the Commonwealth has continually asserted that "by not raising his constitutional claims until the case was entered in the Superior Court, Petitioner waived his opportunity to challenge the district court process [G.L. c. 218, § 30]".

The Commonwealth's assertions that the Petitioner has waived constitutional claims and rights constitutes a misunderstanding of the nature, effect and impact of the dismissal of the initial indict-

ments and the constitutional infirmities upon which the Petitioner relies. The Petitioner could not have raised any challenge to the bind-over procedure in the District Court since the second criminal prosecution, unlike the initial criminal prosecution, was never subjected to the jurisdiction of any division of the District Court. "A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated." United States v. Patterson, 150 U.S. 65, 68 (1893). "In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge." Id., 150 U.S., at 68. On two distinct occasions the Commonwealth initiated criminal prosecutions against the Petitioner which actions required him to answer to such charges.

A determination that a putative waiver by the Petitioner, in the initial prosecution, regulated the fundamental rights which he could have asserted in a subsequent criminal prosecution would violate this Court's precedent relating to waivers in criminal cases and would, concurrently, contravene the Due Process Clause. Waivers in criminal cases must be "voluntary, knowing, and intelligently made . . . " D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972). There must be "an intentional relinquishment or abandonment of a known right or privilege ... Johnson v. Zerbst, 304 U.S. 458, 464 (1938). [A]s the Court has even said in the civil area, '[W]e do not presume acquiescence in the loss of fundamental rights..'" D. H. Overmyer Co., 405 U.S., at 186 (quoting Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937)). It cannot be logically

posited by the Commonwealth that any ostensible waiver by the Petitioner in the initial criminal prosecution constitutes a voluntary, knowing and intelligent waiver of fundamental constitutional rights enuring to his benefit in a criminal prosecution which had yet to be commenced. Necessarily, a waiver under these circumstances could not possibly be characterized as having been voluntarily, knowingly and intelligently made. There could not have been, in these circumstances, "an intentional relinquishment or abandonment of a known right or privilege ... " Johnson, 304 U.S., at 464.

The application of the doctrine of waiver to the facts of this case would also violate the fundamental proscriptions of the Due Process Clause. See Wolf, supra. Nothing could be more arbitrary than to allow the government to enforce the "transfer" of waivers from

one criminal prosecution to another at its own whim and caprice. Due process embodies "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340, 98 ALR 406 (1935), and which define 'the community's sense of fair play and decency,' Rochin v. California, supra, at 173, 96 L. Ed. 183, 72 S. Ct. 205, 25 ALR 2d 1396." United States v. Lovasco, 431 U.S. 783, 790 (1977). The "fair play" and "decency" commanded by the Due Process Clause would be massacred if an individual were to be deemed to have voluntarily, knowingly and intelligently waived fundamental federal constitutional rights in a criminal prosecution not yet commenced as a consequence of a waiver alleged to have occurred in a prior criminal prosecution which had been dismissed.

Even assuming, arguendo, that the first and second criminal prosecutions should be considered as one, there could still not have been a waiver by the Petitioner in this case. The basis of the Petitioner's constitutional arguments is that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution are violated when Superior Court defendants face potential incarceration of 10 years for a first time violation of G.L. c. 265, § 13B while identically situated District Court defendants are subjected to potential incarceration of only 2.5 years. Necessarily, the Petitioner could not have tenably asserted, in the District Court, the existence of a violation predicated upon the Equal Protection or Due Process Clauses since the onerous aspects of this statutory scheme are not visited upon District Court defendants. Federal

constitutional jurisprudence has long dictated that:

> [O]ne who would strike down a state statute as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.
>
> Southern R. Co. v. King, 217 U.S. 524, 534 (1910).

Since the unconstitutional features of the relevant statutes applied only to Superior Court Defendants, it would have been legally impossible for the Petitioner to have challenged the constitutional infirmities of the bind over procedure (G.L. c. 218, § 30) or the disparate ceilings of incarceration while he was subjected to the jurisdiction of the District Court. It is also noteworthy to point out that the Petitioner never di-

rectly challenged the propriety of the bind over procedure. His constitutional attack upon G.L. c. 218, § 30 was and is one aimed at demonstrating that same does not constitute a compelling governmental interest. Indeed, this is consistent with the fact that the Petitioner was never subjected to the provisions of G.L. c. 218, § 30 since the subsequent criminal prosecution was begun by direct indictment in the Worcester Superior Court.

The Petitioner is not unaware of the fact that the disposition of the above articulated issues "may place a further burden on [Massachusetts] in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge has permitted to stand. But the constitutional imperatives of the Equal Protection

Clause must have priority over the comfortable convenience of the status quo." Williams v. Illinois, 399 U.S. 235, 245 (1970). It must be remembered that no Court is "at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as [it may] deem the Defendant innocent or guilty". Hill v. Texas, 316 U.S. 400, 406 (1942.) If there is a differentiation in treatment, which is unjustified, the query truly is "whether the difference does injustice to the class generally, even though it bears hard in some particular case. . ." Bain Peanut Co. v. Pinson, 113 U.S. 499, 501 (1931).

It is, on this late date, unquestionable that "[i]f the court which renders a judgment has no jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any

other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged . . ." Re Nielson, 131 U.S. 176, 182 (1889); see also Ex Parte Royal, 117 U.S. 241 (1886); Re Mills, 135 U.S. 263 (1890); Graham v. Weeks, 138 U.S. 461 (1891); Pollard v. United States, 352 U.S. 354 (1957).

IV. IF STATUTES RESULT IN AN OVERTLY DISCRIMINATORY CLASSIFICATION ONE WHO HAS BEEN INJURED THEREBY IS NOT REQUIRED TO DEMONSTRATE THAT THE DISCRIMINATION IS PURPOSEFUL OR INTENTIONAL

Purposeful discrimination is normally a condition precedent to the assertion of a viable Equal Protection Clause claim. See Mobile v. Bolden, 446 U.S. 55 (1980). However, "[a] showing of discriminatory intent is not necessary when the equal protection claim is based on an

overtly discriminatory classification." Wayte v. United States, 470 U.S. 598, 608 & n. (10); Strauder v. West Virginia, 100 U.S. 303 (1880). The facially discriminatory statutory framework delineated above precludes the presentment of a tenable contention that these statutes do not perpetuate anything but "an overtly discriminatory classification." Clearly, the Petitioner need not show purposeful discrimination in this circumstance. Even assuming, arguendo, that the Petitioner is in need of demonstrating purposeful discrimination he is easily capable of such task. This Court is "..not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect." American Motorist Ins. Co. v. Starnes, 425 U.S. 637, 645 (1976). The discriminatory effect of the statutory scheme here challenged has been noted by

both legal commentators and the press alike. The notes to Mass. R. Civ. P. 3 read as follows:

> General Laws c. 218, §§ 26-27 and c. 279, § 23, when construed together, have led to the settled practice of the District Court, although having jurisdiction of felonies punishable by less than five years at Walpole, sentencing to a jail or house of correction for not more than two and one half years.

On Friday January 1, 1993 a Boston Globe newspaper columnist (Doris Sue Wong) noted, in relation to a pending criminal case subject to the concurrent jurisdiction of both the Superior and District Court Departments, that "[r]ather than allowing the case to remain in a [District Court], the [Assistant District Attorney] sought direct indictments sending the matter to Superior Court, where penalties are stiffer." The discriminatory purpose of the statutes in question have been proven by their facial language

and noted by both legal commentators and members of the press. It is without doubt that these statutes effect a discriminatory purpose. See Wayte v. United States, Strauder v. West Virginia and American Motorist Ins. Co. v. Starnes.

CONCLUSION

It is requested that the within Petition be granted because "there are special and important reasons therefor." Sup. Ct. R. 10. .1. The Massachusetts Appeals Court "has decided an important question of federal law . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10. .1.(c). Thousands have, are or will be incarcerated, in abrogation of their fundamental rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, in the absence of review by this Court. The legal issues raised in this

Petition are, necessarily, of grave public concern.

Brendan J. Perry, Esquire
Counsel of Record
Christopher M. Perry, Esquire
Terance P. Perry, Esquire
BRENDAN J. PERRY & ASSOCIATES, P.C.
95 Elm Street
P.O. Box 6938
Holliston, MA 01746
(508) 429-2000